[Lord ELLIOCK Reporter.] *August* 10. 1780.

INFORMATION

FOR

The Magiſtrates, Town-council, and Kirk-ſeſſion of QUEENSFERRY,

AGAINST

The Heritors and Kirk-ſeſſion of the pariſhes of KIRKLISTON, DALMENY, and LARGO.

PErhaps there is no country in the world where the maintenance of the poor is leſs burthenſome to communities, or to individuals, than in Scotland; and for this reaſon it is, that your Lordſhips are troubled with ſo few queſtions upon that ſubject.

The preſent proceſs, however, is a queſtion upon that ſubject of a pretty curious and complicated nature; in which the Lord *Elliock* Ordinary has pronounced different judgements, and has at laſt taken the cauſe to report.

In the year 1776, a proceſs was brought at the inſtance of the heritors and kirk-ſeſſion of Kirkliſton, againſt the magiſtrates and kirk-ſeſſion of Queensferry, ſetting forth, "That where, "*by the laws of Scotland*, the burden of maintaining ſuch poor "perſons, as from old age, infirmity, or other circumſtances, "are unable to ſupport themſelves, or their infant-children, lies "and is impoſed on the pariſh where ſuch poor perſons have "had *their laſt three years reſidence*; that this notwithſtanding, "Helen Reid, relict of Robert Muir, late coachman to Mr Dur-"ham of Largo, having come, with ſix infant-children of hers,

" to the village of Kirkliſton, about the month of March in the " year 1775, ſhe and her ſaid children have reſided there ever " ſince; and the ſaid Helen Reid being *a very poor perſon, and ut-* " *terly unable to ſupport herſelf and her children*, ſhe and they have " thereby become a burden upon, and have been chiefly ſupport- " ed out of the charity and poor's funds of the ſaid pariſh of " Kirkliſton ſince they came to reſide there, to the great preju- " dice of the proper poor of the ſaid pariſh, although the ſaid pa- " riſh is not by law bound or able to maintain the ſaid Helen " Reid or her children, neither ſhe, nor any of them, having been " either *born* in that pariſh, *or* having reſided in it at any time for " the ſpace of three years, at leaſt not having had *their laſt three* " *years reſidence* in that pariſh: And true it is, That the ſaid He- " len Reid, and her ſaid children, reſided in the town, at leaſt in " the pariſh of Queensferry, and ſhire of Linlithgow aforeſaid, from " the month of July 1766 to the month of February 1770, at leaſt " for a period of upwards of three years; and they have had *their* " *laſt three years reſidence* in the ſaid pariſh of Queensferry, where- " through the ſaid pariſh of Queensferry is by law bound to " maintain and ſupport them;" and concluding, That it ſhould be found and declared, by decreet of your Lordſhips, " That the " burden of maintaining and ſupporting the ſaid Helen Reid " and her children, does not lie upon the ſaid pariſh of Kirk- " liſton, or heritors, kirk-ſeſſion, or inhabitants thereof; but " that the ſame lies upon the ſaid pariſh and town of Queenſ- " ferry, and upon the heritors, kirk-ſeſſion, magiſtrates, town- " council, and community, of ſaid pariſh and town."

When this proceſs came to be debated before the Lord *Elliock* Ordinary, it was contended on the part of Queensferry, That Kirkliſton was in a miſtake in ſuppoſing, that the laſt three years reſidence of Helen Reid and her children had been in the town of Queensferry; for that it had been in the pariſh of Largo.

His Lordſhip allowed a proof; and on the 28th February
Feb. 28. 1777. 1777, was pleaſed to pronounce the following interlocutor. " Having conſidered the proof, and teſtimonies of the witneſſes " adduced by the defenders, from which it appears, that Helen " Reid and family did not reſide *for laſt three years* in Queenſ- " ferry, ſuſtains the defences pled for the magiſtrates and kirk- " ſeſſion of Queensferry, aſſoilzies them from the concluſions of " the libel, and decerns."

Kirkliſton

Kirkliſton gave in a repreſentation: upon conſidering which, with anſwers, his Lordſhip was pleaſed, on the 8th July 1777, July 8. 1777. to *refuſe* the ſame.

Another repreſentation having been given in for Kirkliſton, the pariſh of *Largo* was called into the field; and having been heard by counſel upon the import of that proof upon which Queenſferry had been aſſoilzied, the Lord Ordinary was pleaſed, on the 7th March 1778, to pronounce the following interlocutor. "Ha- Mar. 7. 1778. "ving conſidered the proof adduced in the conjoined proceſſes "at the inſtance of the heritors and kirk-ſeſſion of Kirkliſton, a- "gainſt the heritors and kirk-ſeſſion of the pariſhes of Queenſ- "ferry and Largo, and the foregoing minute of debate; in re- "ſpect it appears that the pauper did not reſide three years in the "pariſh of Largo, and there is no evidence of a three-years re- "ſidence in Queensferry, ſuſtains the defences for both the pa- "riſhes, aſſoilzies from the concluſions of the libel, and decerns; "ſuperſeding extract till the 12th day of June next."

Againſt this interlocutor Kirkliſton repreſented; and the Lord Ordinary was pleaſed, on the 8th Auguſt 1778, to pronounce Aug. 8. 1778. the following interlocutor. "Having conſidered this repreſen- "tation, with the anſwers for the magiſtrates and kirk-ſeſſion "of Queensferry, and former procedure had in the cauſe, *in re- "ſpect it is not denied, but even ſeems to be admitted*, on the part "of the defenders, that the pauper Helen Reid reſided for *three "years* in the pariſh of Queensferry, *immediately preceding her re- "moval to Largo*, with her huſband, find the expence of main- "taining the ſaid pauper Helen Reid ought to lie upon the pa- "riſh of Queensferry, and the ſaid pariſh are bound to relieve "the pariſh of Kirkliſton thereof in terms of the libel."

Queensferry then repreſented; and as neither the magiſtrates nor members of ſeſſion, could ſay, from their own perſonal knowledge, how the fact ſtood, his Lordſhip allowed a proof, and on the 9th March 1779, was pleaſed to pronounce the fol- Mar. 9. 1779. lowing interlocutor. "Having conſidered the proof adduced "for the purſuers in this cauſe, finds it proven, That *the laſt "three years reſidence* of the pauper Helen Reid was in the pa- "riſh of Queensferry; therefore finds, the magiſtrates and kirk- "ſeſſion of Queensferry are bound to relieve the pariſh of Kirk- "liſton of the burden of maintaining the ſaid Helen Reid; and "decerns againſt the ſaid magiſtrates and kirk-ſeſſion of Queenſ-

"ferry,

" ferry, in terms of the concluſions of the libel; but ſuperſedes " extract till the 12th day of June next."

Againſt this interlocutor Queensferry repreſented; and on the
Nov. 25. 1779. 25th November 1779, the Lord Ordinary was pleaſed to pronounce the following interlocutor. " Having conſidered the repreſenta- " tion for the magiſtrates and kirk-ſeſſion of Queensferry, with " the anſwers made thereto for the pariſh of Kirkliſton and the " pariſh of Largo, refuſes the deſire of the repreſentation, and ad- " heres to the former interlocutor.

A repreſentation was then given in for Queensferry to this effect. " The repreſenters do not mean at preſent to argue the cauſe at " length, but to ſtate to your Lordſhip, that they now perceive " that all parties having intereſt are not in the field; for, unac- " countable as it may appear, the fact is, that the pariſh of Dal- " meny, the place of the pauper's nativity, has never yet been " called.

" That being the caſe, it would be improper to carry on the " litigation farther till that neglect be ſupplied."

" In the prayer of a repreſentation for the pariſh of *Kirkliſton*, " as far back as July 1777, there is the following alternative. " Or at any rate, to ſiſt the preſent proceſs till the month of No- " vember next, that in the mean time the repreſenters may bring " the above-mentioned proceſs of declarator againſt the foreſaid " three pariſhes, of *Dalmeny*, *Largo*, and *Queensferry*."

And the prayer was in theſe words. " May it therefore pleaſe " your Lordſhip, to alter your laſt interlocutor, and aſſoil- " zie the repreſenters; or at leaſt to ſiſt this proceſs until the " proceſs againſt the pariſh of *Dalmeny* be brought into court, and " conjoined with it."

Dec. 10. 1779. But on the 10th December 1779, the Lord Ordinary was pleaſed to *refuſe* the deſire of this repreſentation, and *adhere* to his former interlocutor.

Queensferry having brought Dalmeny into the field, another repreſentation was given in; and the Lord Ordinary was pleaſed,
Jan. 18. 1780. on the 18th January 1780, to pronounce the following interlocutor. " Having conſidered this repreſentation, before anſwer, or- " dains the procurators for the pariſh of Dalmeny to ſtate their " defences in the action now brought againſt that pariſh, and to " be ready to debate at the Ordinary's next hour."

Mar. 4. 1780. On the 4th of March 1780, the counſel for all the four pariſhes appeared

appeared at the Lord Ordinary's bar, and his Lordſhip then was pleaſed to conjoin the proceſſes, make aviſandum to your Lordſhips, and order informations. And in obedience to his Lordſhip's order this is humbly offered for Queensferry.

The points to be ſubmitted to your Lordſhips conſideration are *four* in number. 1*mo*, That Helen Reid cannot be conſidered as a pauper, a term which we have lately adopted from the Engliſh law, as being more conciſe than any expreſſion of our own. 2*do*, That the town of Queensferry cannot be conſidered as a pariſh in the full ſenſe of the words, and to all intents and purpoſes. 3*tio*, That the plea of three years reſidence cannot take place here, that being only applicable to caſes where the place of the pauper's birth is not known; whereas in this caſe it is known. And, 4*to*, That, as was found at firſt by the Lord Ordinary, the laſt three years reſidence of this pauper was not in Queensferry.

As to the *firſt* point, that Helen Reid cannot be conſidered as a pauper, it will no doubt be alledged, that a certificate is produced in proceſs by Alexander Fleming, ſtyling himſelf *eleemoſinary*, and Alexander Fotheringham ſeſſion-clerk of Kirkliſton, bearing, That ſhe came to that pariſh after her huſband's death, with her children, in very indigent circumſtances, and has been ſupported ever ſince from the poor's funds, and other charitable donations.

But it is ſubmitted to your Lordſhips, whether or not this certificate ſhould be held as ſufficient; more eſpecially as Helen Reid, the pauper, was herſelf examined as a witneſs in this cauſe, after an objection to her admiſſibility had been repelled, upon adviſing with your Lordſhips; and her appearance was not only that of a ſtout hale woman, very able to work, but her dreſs was ſuch as by no means correſponded with poverty. Your Lordſhips, therefore, will conſider, whether it is not incumbent upon the purſuers to bring more ſatisfactory evidence, before they can obtain a judgement in terms of their libel. Feb. 24. 1779.

To illuſtrate this by analogy, it is to be obſerved, that an act of parliament for England, 9th George I. cap. 7. § 1. enacts, "That no juſtice of peace ſhall order relief to any poor perſon dwelling in any pariſh, till *oath* is made of ſome reaſonable cauſe for it."

As to the *ſecond* point, the informants beg leave to plead, That though their little diſtrict is erected into a ſeparate eſtabliſhment *quoad ſacra*, upon condition that the inhabitants ſhould be

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aſſeſſed in 10 per cent. of their yearly rent for the maintenance of a miniſter; yet this royal burgh cannot juſtly be held as a pariſh in any other reſpect. The whole of its bounds is about 400 yards in length, and 100 in breadth; and it has not right to one farthing of tithes, or an inch of ground without the walls; and therefore they apprehend, that there are not *termini habiles* for a proceſs of this nature againſt their town.

As to the *third* point, the informants do, with reſpectful ſubmiſſion, maintain, that this court is bound by the ſtatutory regulations concerning the maintenance of the poor; and by theſe regulations it is eſtabliſhed, that the pariſh where a pauper was born ſhall be ſubjected to the maintenance. And accordingly this was ſolemnly decided by the court, 3d March 1757, *Kirk-ſeſſion of Inveresk* againſt *Kirk-ſeſſion of Tranent*, where "the Lords found, "That the kirk-ſeſſion of Inveresk is bound to maintain the "child, *in reſpect of its birth*; and remitted to the Lord Ordinary "to proceed accordingly."

It is very true, that there appears a different deciſion from this, 7th Auguſt 1767, *Baxter* againſt the *Pariſh of Crailing*, *&c.* where "the Lords found, That John Baxter was intitled to be main-"tained by the pariſh of Roxburgh, as the pariſh where he reſi-"ded during *the immediate three years preceding his application for* "*charity.*"

This deciſion is ſaid to have proceeded upon an inquiry ordered by the court as to the practice; and it is ſaid, that it appeared to be the general practice, that the pariſh where the poor perſon reſided for *the laſt three years* was burdened with the maintenance. But this practice muſt have been only *ex gratia* of particular pariſhes, who have not been willing to do ſo harſh a thing as the opulent pariſh of Kirkliſton is now attempting to do, viz. expelling a poor perſon, or one ſaid to be ſuch, from its bounds. For the burden could not be *legal*, otherwiſe the deciſion in 1757 could not have been pronounced. At any rate, that deciſion being only ten years prior to the deciſion in the caſe of Baxter, undoubtedly proves, that there had been no *immemorial cuſtom*, no *preſcription* contrary to the ſtatutory regulations; and, conſequently, that it cannot be alledged the ſtatutes making the birth-place, or *locus originis*, liable for the maintenance of a pauper, have gone into *deſuetude*; ſo that, with all due deference, the laſt deciſion of the court appears rather to have been a ſtretch of the *nobile officium*,

cium, and ſhould not influence your Lordſhips ſo much as former deciſions in conformity with the acts of the legiſlature.

Theſe acts are, 1535, cap. 22. 1551, cap. 25. 1579, cap. 74. 1663, cap. 16. 1672, cap. 18. Beſides, by ſeveral acts of the privy council between 1692 and 1698, particularly one in 1693, it is declared, That the pariſh in which the poor were *born*, ſhall maintain them, *when that can be known*; and where that is not certain, the pariſh where they *laſt reſided* for the ſpace of ſeven years. And theſe acts of the privy council were ratified in parliament by 1695, cap. 43. and 1698, cap. 21.

When the law is ſhewn by ſuch an accumulation of authorities to ſtand thus, the informants will be pardoned for doubting, whether a ſingle deciſion of the court ſhould be ſufficient to abrogate what has been eſtabliſhed by the legiſlature. They are adviſed, that to maintain that it ought to be ſufficient, would be going a great deal too far; and therefore the judgement pronounced in that ſingle caſe certainly deſerves a reconſideration.

At any rate, even upon the principle of the deciſion in the caſe of *Baxter*, the informants apprehend, that they cannot be found liable; for it is moſt certain, that, as was found by the Lord Ordinary's interlocutor 28th February 1777, this pauper "did not "reſide for *laſt* three years in Queesferry."——And the fact is incontrovertible, that ſince the month of February 1770 ſhe has not had one day's reſidence in that town.

The requiſite, therefore, of the deciſion in the caſe of *Baxter* is totally awanting here; for there the court burdened the pariſh where he reſided during "*the immediate three years* preceding his "application for charity." The reſult of the inquiry is ſaid to be, that the pariſh where the poor perſon reſided for *the laſt three years* was burdened with the maintenance;—and the clauſe in the act of parliament 1672, c. 18. upon which the plea as to three years reſidence is founded, directs "Liſts to be made of the "poor in each pariſh where they were *born*, and in what pa-"riſhes they have *moſt haunted* during *the laſt three years*."

The reaſon of the thing ſeems to be, that the place where a perſon becomes indigent, provided that perſon has had a reſidence in the place for a conſiderable ſpace of time, is preſumed to have been benefited by that perſon's labour, and ſhould therefore be ſubjected to the burden of maintenance. But it ſeems to be a very new and extraordinary doctrine, that neither the place of

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the pauper's firſt entering upon exiſtence, as our acts of parliament, and former practice in the court, point out, nor the place where the pauper has reſided immediately previous to ſtanding in need of and applying for charity, ſhould have the burden of the maintenance; but that a general inveſtigation ſhould be made into the hiſtory of the poor perſon's life; and if perchance it can be diſcovered, that he, or ſhe, has reſided in ſome third place for the ſpace of three years, that the third place ſhould, at whatever diſtance of time, be loaded with the burden of maintenance.

If your Lordſhips ſhould think yourſelves bound by the laſt deciſion of the court, though but a ſingle judgement, in oppoſition to ſtatutory regulations and the courſe of former deciſions, you will not ſurely allow it to have influence, if, upon a mature examination, it is found not to apply; and it has been ſhewn to be applicable ſolely to the place where a pauper's later reſidence has been.

Indeed, were plain reaſon and equity of themſelves to rule the preſent queſtion, it is humbly thought that there could be no queſtion that Kirkliſton ſhould much rather be found liable in the maintenance of this pauper than Queensferry: for the fact is, that ſhe went to reſide in the pariſh of Kirkliſton as ſoon as ſhe was able to gain her livelihood, and ſpent her youth and ſtrength in that pariſh, which of conſequence has been moſt benefited by her; whereas the reſidence of an old date, which it is proved ſhe had in Queensferry, was ſuch a reſidence as ſhould ſcarcely come under that denomination, or found a connection between her and that pariſh; for her huſband Robert Muir was driver of the ſtage-coach between *Edinburgh* and the *Halls*, which laſt place is in the pariſh of Dalmeny; and the houſe in which his wife reſided, and where he uſed alſo himſelf to come and ſleep, is proved to have been upon the confines of the two pariſhes; ſo that it ſtands half in the pariſh of Dalmeny, and half in that of Queensferry, though indeed it appears that what was occupied by them was in Queensferry.

The important point however is, that this woman's reſidence for *the laſt three years* before making application for charity, was certainly *not in the Queensferry*; and this being proved beyond the poſſibility of diſpute, the informants apprehend that they have no further concern with the matter, and that it is incumbent upon the pariſh of Kirkliſton, which is inſiſting to be free of her, to

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get the burden laid, either upon the parish of Dalmeny, or upon those parishes where she has of late *most haunted*. But to go back to a distant period, and throw the burden upon the Queensferry, in consequence of a residence of an old date, and such a residence too, is, in the informants humble apprehension, an attempt which will not receive the countenance of your Lordships.

As to the *fourth* point, That the last three years residence of this pauper was not in Queensferry, the informants have already had occasion to speak to it pretty fully under the third head. But in fact they have done more than they were bound to do; for they have proved that the last three years residence of this pauper was in another parish, viz. in the parish of *Largo*.

For it is in proof before your Lordships, by the oaths of *John Selkrig*, feuer in Largo, and *Elisabeth Yule* his spouse, that Robert Muir, this pauper's husband, had for *the last three years* of his life a house in the parish of Largo, which he took from the said Robert Selkrig, viz. from Whitsunday 1772 to Whitsunday 1775: That he and his family entered to the possession thereof about eight or ten days after Whitsunday 1772; and that after his death his widow and children remained in the house, and did not leave it till the 4th April 1775.

It is humbly apprehended, that your Lordships will not be moved by the objection, That it was a few days after the term when this family went to their house; and that after Robert Muir's death, his widow and children left the house a little before the last term of the three years, viz. in the month of April. For the pauper's furniture remained in the house, hypothecated for the current rent, for the payment of which it was afterwards sold; and it cannot be disputed, that during the whole course of these three years, her house in the parish of Largo was her only legal domicile. All which being considered, it would, with submission, be putting an unreasonable judicial construction upon the phrase, *last three years residence*, should it be held that a literal continued residence, *de die in diem*, during the whole of that period, is requisite; and that a general and ordinary residence, though there may have been some small portions of absence, no matter whether at the beginning, in the middle, or at

the end of the three years, is not to be conſidered as ſufficient. Such nicety of calculation may be very ſuitable in matters of ſcience; but in a judicial queſtion, it is thought the legal underſtanding of words muſt be the rule. If that is not to be the caſe, a proof of three years reſidence would be a very difficult matter; for it would be neceſſary, that a pauper ſhould be ſtrictly watched during all the days of theſe years, in order to have it aſcertained, that the full and complete period was fulfilled.

Upon all, or one or other of theſe particulars, the magiſtrates, town-council, and kirk-ſeſſion, of Queensferry, hope to be aſſoilzied.

In reſpect whereof, &c.

JAMES BOSWELL.